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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 552

WILLIAM FREDERICK ZIMMER,

Petitioner,

—v.—

STATE OF KANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

William Frederick Zimmer prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas, entered in the above-entitled case on April 8, 1967.

Citations to Opinions Below

The opinion of the Supreme Court of Kansas is reported in 198 Kan. 479 (1967) and is printed in the Appendix, *infra*.

Jurisdiction

The judgment of the Supreme Court of the State of Kansas was entered on April 8, 1967 (R. 510). A timely petition for rehearing filed on April 28, 1967 (R. 525), was

denied on May 1, 1967 (R. 527). On July 18, 1967, Mr. Justice White issued an order extending the time to file this petition for writ of certiorari until August 30, 1967, and staying the execution of the death penalty pending the action of the Supreme Court on the petition. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3) since rights, privileges, and immunities are claimed under the Constitution of the United States.

Questions Presented

1. Whether petitioner waived his right under the Fourth and Fourteenth Amendments to be free from unwarranted search and seizure of his automobile, when his consent to such search and seizure was given when he had not been advised of his right to refuse consent and when the police knew that he was under the influence of alcohol.

2. Whether petitioner was deprived of his right to counsel under the Sixth and Fourteenth Amendments by the trial court's refusal to grant his initial request for appointment of counsel.

3. Whether petitioner's rights under the Due Process Clause of the Fourteenth Amendment were abridged by the trial court's refusal to grant a continuance to enable petitioner's counsel adequate time to prepare for trial.

Statement of the Case

Petitioner, William Frederick Zimmer, was convicted on April 1, 1965, of the offenses of kidnaping in the first degree, with harm inflicted (K. S. A. 21-449), and of murder

in the first degree (K. S. A. 21-401), after trial in the Second Division of the District Court of Shawnee County, Kansas. The jury imposed the death penalty for the kidnaping charge and life imprisonment for the murder charge. The charges grew out of the abduction and slaying of Gladys Cora Johnson, a Negro girl aged seven years.

At trial, the prosecution presented the following evidence. At 7:30 A.M. on Saturday, November 14, 1964, in Topeka, Kansas, Betty Michael, the mother of Gladys Cora Johnson, left for work, leaving her three children at home to be looked after by neighbors (R. 49). Shortly after 8:00 A.M., two of the three children came to the front door of Mrs. Reba Glasgow, who lived nearby. The children were crying and screaming, and they said that a man had taken away their sister (R. 43).

Driving around north of Topeka that morning, Staff Sgt. Charles C. Guillory drove into a field to examine a car he saw parked there. The occupants of the parked car were a white man and a young Negro girl. After a brief conversation with the driver, Guillory noticed that the little girl was crying, although she did not say anything. As he left, he observed the make of the car and wrote down the license number (R. 45). He reported the incident to the sheriff's office by telephone about 9:00 A.M. The license tag was registered in petitioner's name. Zimmer had once been arrested for child molestation but the charge had been dismissed for want of prosecution (R. 150-52). On Sunday, the next day, Guillory identified photographs of Zimmer as being the man he had seen and a photograph of Gladys Cora Johnson as being the girl. He later identified Zimmer in a lineup and identified photographs of Zimmer's car as being the one he had seen in the field (R. 397-99).

Marjorie Siebert, who worked in a liquor store in Wamego, Kansas, testified that during the noon hour on Saturday, November 14, 1964, she observed a man, whom she later identified as Zimmer, park a car by the curb and make a purchase in a restaurant next door (R. 400-01). During this time, she observed a small Negro child between six and seven years of age in the car. The girl did not attempt to get out of the car and was not crying. The man later returned alone and bought some liquor in her store. She testified that there were blood stains around his fingernails (R. 46-47).

Zimmer was apprehended by officers of the Marysville Police Department in Marysville, Kansas, at about 8:55 P.M. on Sunday, November 15, 1964, while he was talking to his brother-in-law, Red Harberts, in front of the Dixon Tire Company (R. 52-55). One officer asked him to get in the police car and come with them, because "there was a matter to be straightened out" (R. 66). Zimmer was driven to Harberts' house, where the police expected to find FBI Agent Topousis. When they did not find him, they drove to the police station, then back to Harberts' house where Agent Topousis was finally found (R. 188-90). Agent Topousis placed Zimmer under arrest and asked Zimmer where his car was. Zimmer replied that it was "up the street somewhere." Agent Topousis asked, "Would you mind if we looked into your car?" Zimmer replied: "I don't mind at all. You can look at anything I have" (R. 69-70). He was then taken to the police station. Several descriptions were given of Zimmer's condition during this entire period of arrest. One officer said: "I'd say he'd been drinking. As far as being drunk that I couldn't say" (R. 55). Another officer testified that "He was a little loose

kneed or whatever you want to call it. He appeared to me to be drinking. . . . [H]e appeared to have a thick tongue you know like a person been drinking some." He was slow responding to questions (R. 68). Red Harberts testified that Zimmer "was very much intoxicated at the time" (R. 191). Zimmer had two half pints of whiskey with him when arrested (R. 72).

Zimmer was first advised of the charges against him at the jail house (R. 71). Agent Topousis testified that he was immediately advised of "his constitutional rights" (R. 71), but Officer Estes testified that this did not occur until shortly after the questioning began. Only the right to counsel and the right to remain silent were mentioned (R. 58). Questioning lasted from about 9:20 to about 10:30 P.M. (R. 61). While the questioning went on, Officer Estes, Officer Bogart and Red Harberts went to search Zimmer's car. The car was searched thoroughly with a flashlight. No weapon was discovered in the car except a shotgun in the trunk (R. 68). Some spots of red were also discovered in the trunk (R. 63). After these three men returned and reported to the police station, Agent Topousis searched the car with similar results (R. 70).

Meanwhile, the Topeka Police Department had been contacted, and around midnight of November 15, Officer Monthey of the Topeka Police Department, two other police officers and the County Attorney arrived in Marysville. Zimmer was again advised of his right to have a lawyer and of the fact that statements made by him could be used against him (R. 404). Officer Monthey told Zimmer that they were going to want to look at his car and to take it to Topeka to process it. Zimmer replied: "Be my guest. Do what you want with it" (R. 404). It was still noticeable at

this time (1:00 A.M.) that Zimmer had been drinking (R. 406). Officer Monthey then took a detailed statement from Zimmer. Zimmer said that he was employed by the Union Pacific Railroad in Kansas City, Kansas. On Friday, November 13, 1964, he got off work about 4:00 P.M. and drove to Topeka. There he bought some shotgun shells and purchased at least two pints of whiskey. He drank some beer and some whiskey at a tavern. He spent the evening in the company of a woman and a man he met. The next thing he remembered was waking up Saturday morning in his car near the Topeka Fire Station with no money except $6.00 hidden in a secret compartment in his wallet. He had a drink and, according to his statement, spent the rest of the day driving in the vicinity of Marysville, Manhattan, Concordia, and Miltonville, Kansas, and doing some pheasant hunting on the way. He shot two pheasants, but threw them away. He spent Saturday night with a lady acquaintance in a motel in Washington, Kansas, hunted pheasant again on Sunday, and in the early evening sought out his brother-in-law, in whose presence he was apprehended (R. 408-09).

Following his statement, Zimmer was permitted to place a telephone call to Red Harberts to ask him to call his wife and request that she find him a lawyer (R. 405). Zimmer was then driven to Topeka, arriving about 6:00 A.M. on Monday, November 16th. At about 9:00 A.M., after Zimmer's car had already arrived in Topeka, Zimmer was served, for the first time, with a search warrant concerning the car. Officer Monthey testified that the warrant was given to Zimmer, but that he handed it back, saying that he "wasn't interested in it" (R. 413). Zimmer's car was thoroughly searched and examined, and samples from the

car were sent to the Kansas Bureau of Investigation. A hatchet was discovered in the trunk of the car, in a position which should have been visible to the searchers the night before (R. 89). Traces of blood on the blade of the hatchet were of Gladys Cora Johnson's blood type (R. 125), and several hairs stuck to the blade corresponded to the hair of Gladys Cora Johnson (R. 133). Zimmer denied that it was his hatchet or that he had ever seen it before (R. 144). The police admitted that the hatchet had not been examined for fingerprints (R. 92-93). Monday evening, Zimmer received a visit from his wife and Mr. Mahoney, an attorney from Kansas City (R. 161).

On Tuesday, November 17, 1964, after further questioning, Zimmer made a statement that he did remember "being in the pasture north of town with a little colored girl and she was crying" (R. 145). He didn't remember anyone coming around the car; he took a drink of whiskey and lost consciousness. When he awoke, it was about dusk, and he discovered the girl lying in the trunk of his car, dead. Zimmer said that he placed the body beside a nearby dry-wash and then drove around aimlessly, trying to remove evidence that the girl had been in his car. The rest of his statement corresponded to his original story (R. 145-46). Although Zimmer cooperated fully with the police in trying to remember where he had been when he hid the body of the girl, the body was not found until November 21, 1964. Autopsy established that the girl had been killed by a large crushing blow to the right side of the head. There were also four large wounds across the shoulder, one of which had crushed a vertebrae and cut the spinal cord (R. 436-37). There was no evidence of sexual molestation (R. 438).

At trial, Zimmer testified that he had left Kansas City Friday afternoon for a weekend hunting trip with his brother-in-law Red Harberts. The testimony as to his activities and drinking Friday night corresponds to what he had told the police. Saturday morning he woke up in his car and discovered that all of his money except $6.00 had vanished from his wallet. In the back seat was a man who said that Zimmer had promised to take him to Manhattan. Zimmer began the drive, but after several drinks he got into the back seat and let the other man drive. The next thing he remembers is waking up in a pasture by the car and discovering the body of the girl in the trunk of his car. He denied ever seeing Gladys Cora Johnson alive, and he said that he had told the police the contrary only so that they would stop bothering him (R. 165). The rest of his statement until the time of his arrest corresponds to what he told the police at the time of his arrest (R. 154-159).

According to the opinion of the Supreme Court of the State of Kansas, Mr. Sam Crow was appointed counsel for Zimmer on November 19, 1964, for the purpose of the preliminary examination which was held November 25th, at the conclusion of which Zimmer was bound over for trial to the District Court of Shawnee County (R. 511; App., *infra*, p. 3a). On December 18, 1964, Zimmer filed an application for appointment of counsel to represent him at trial. Mr. Crow was appointed to represent Zimmer during the hearing on the application, which was held on December 29, 1964 (R. 8). At the hearing it emerged that before his alleged offense, Zimmer had been earning about $600 a month, that his wife had been earning about $400 a month, that their home had a market value of about $10,000, that they owned two cars, that they had an account of about $2000 in

a credit union and about $800 in a bank account (R. 380-81). After charges had been filed in the present case, the credit union fund had been transferred to his wife, and he had signed papers turning the house over to his wife and giving her power of attorney. He did not know why his wife's counsel had requested that he do all this (R. 382). The following exchange took place between Zimmer and Mr. Hecht, the county attorney:

> Q. Mr. Zimmer, other than Mr. Crow or members of his law firm and other than the attorney who came to see you when you were in confinement in the city jail before Mr. Crow talked to you, have you talked to any other attorney? A. No, sir, I haven't been able to, I have been in jail.
>
> Q. Have you made any telephone calls to any other attorneys? A. No, sir.
>
> Q. Have you requested to do so? A. No, sir.
>
> Q. Have you sent any letters to any other attorneys? A. No, sir.
>
> Q. Have you written any letters at all while you have been in jail? A. I have written about three letters answering some letters I got from friends.
>
> Q. Your mail has been going out and coming in? A. I have received mail.
>
> Q. And your mail has been delivered out of the jail? A. As far as I know.
>
> Q. Have any attorneys other than the one who came to see you before Mr. Crow saw you, has anyone refused to handle your case? A. I haven't contacted any attorneys so how could they refuse? (R. 383).

On December 30, 1964, the trial judge denied Zimmer's application. The judge found that the defendant was "not

indigent and therefore is able to employ counsel of his own choosing. No evidence has been presented to show that defendant has made any effort to employ counsel, nor is there evidence that any counsel has refused employment" (R. 8).

On January 25, 1965, while Zimmer was still unrepresented by counsel, the court appointed a commission to examine the defendant to determine his competency to stand trial (R. 8-9). On February 2, 1965, the court accepted the report of the commission that Zimmer was competent to stand trial. That same day the court found that defendant "does not have counsel of his own choosing nor has he employed counsel, and that he has so advised this court, and that he has further advised this court that he does not intend to employ counsel" (R. 10). Mr. Elwaine Pomeroy was therefore appointed to represent Mr. Zimmer. No mention was made of the impending divorce action which, according to Appellee's Brief below (p. 43), Zimmer's wife had begun the day after the trial judge had denied Zimmer's request for counsel. The State filed a motion to intervene in this divorce suit in order to have a portion of the marital property set aside to defray the cost of the defense. This motion was denied, but not until February 5, 1965—three days after the trial judge had decided that counsel should be appointed.

At trial, one of Zimmer's main defenses was that of insanity, and Dr. Herbert C. Modlin, one of the three members of the sanity commission which had examined Zimmer, was called to testify. Dr. Modlin testified that in spite of the fact that Zimmer had been "wary" of answering questions before the sanity commission since he was not represented by counsel, he had finally answered many questions about

the events of November 13-15, 1964 (R. 202-203). The county attorney made a concentrated effort to use Dr. Modlin's recollection of that conversation to impeach Zimmer's earlier testimony (R. 209-15).

How the Federal Questions Were Raised

1. The question regarding the illegal search and seizure of petitioner's automobile and the consequent admission of evidence from that seizure was raised in the specifications of errors filed after trial below (R. 256). No objection had been made at the trial to the reception of the evidence, but although the Supreme Court of the State of Kansas remarked about the applicability of the so-called "contemporaneous objection rule" (K. S. A. 60-404), it did not rest its disposal of the issue on this ground, apparently because the case was capital. The court found that there was "clear and convincing evidence of express, voluntary, intelligent consent" and accordingly found that there had been waiver of the right to be protected from illegal search and seizure (R. 521; App., *infra*, p. 34a).

2. Petitioner's temporarily appointed counsel argued at the special hearing on December 29, 1964, that the trial judge was required by the decisions of this Court following *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), to appoint counsel when petitioner first requested it (R. 377-78). The issue was specified as error following trial (R. 256) and discussed fully on federal grounds by the Supreme Court of the State of Kansas (R. 510-512; App., *infra*, pp. 2a-7a).

3. Counsel's motion for a continuance was made on March 12, 1965, three days before the trial was scheduled to

begin. It followed long argument about the effect of the County Attorney's refusal to have a certain pill found on petitioner's person at the time of arrest analysed at State expense, and about the fairness of allowing the State to endorse additional witnesses shortly before trial. Both of these issues were clearly understood to bear upon the ability of counsel to prepare petitioner's defense in the available time (R. 34-43). At the end of these discussions, when counsel's motions to have the pill analysed at State expense and to prevent the State from endorsing additional witnesses had been denied, the following interchange took place (R. 43):

> "Mr. Elwaine Pomeroy: Your Honor, I have a further matter to make then in view of the Court's ruling.
>
> The Court: All right.
>
> "Mr. Elwaine Pomeroy: We would respectfully move the Court for at least a one week's continuance in the trial of this case so as to allow us to adequately prepare for the defense.
>
> The Court: That motion will be overruled."

The denial of this motion was specified as error (R. 256) and was argued before the Kansas Supreme Court as a violation of the Due Process Clause of the Fourteenth Amendment. The Kansas Supreme Court considered the issue but expressly refused to find a denial of due process (R. 514; App., *infra*, pp. 11a-12a) in large part because it claimed that "no particular reason" was advanced for the motion, that is, that "good cause was not shown." The Court did not consider the context in which the motion was made, which gave ample reasons for the request.

Reasons for Granting the Writ

1. The search and seizure issue in this case raises an important constitutional question concerning the standards to be applied in judging the force of an alleged waiver of a vital constitutional right. In this case, the police had no right to seize and search petitioner's automobile* without a warrant, unless petitioner waived his right to be protected from such invasion of his privacy by the Fourth and Fourteenth Amendments, because the search was neither incident to the arrest nor otherwise reasonable. *Preston* v. *United States*, 376 U. S. 364 (1964). Cf. *Carroll* v. *United States*, 267 U. S. 132 (1925); *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Cooper* v. *California*, 17 L. Ed. 2d 730 (1967).

It was recognized in *Zap* v. *United States*, 328 U. S. 624 (1946), that the Fourth Amendment right against illegal searches and seizures may be waived. *Zap* was the sole federal authority for the Kansas Supreme Court's dismissal of petitioner's contention. But this Court has not yet set down specific standards for a competent waiver of this right. United States Courts of Appeals, which have frequently been faced with the precise question of what constitutes a competent waiver, have generally been strict in their requirements.** One such case is *United States* v. *Page*, 302 F. 2d 81 (9th Cir. 1962):

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* The fruits of the two illegal searches included a blood-stained cardboard box (R. 69, 416), a blood-stained newspaper (R. 73, 416), articles of clothing containing hair particles and blood stains (R. 73, 416-417, 445-446), and a shotgun and shells (R. 68, 73). In addition, the seizure and transport of the car to Topeka took place before issuance of the search warrant.

** The federal standards now apply to the States. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Ker* v. *California*, 374 U. S. 23 (1963); *Beck* v. *Ohio*, 379 U. S. 89 (1964).

> The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be "unequivocal and specific" and "freely and intelligently given." There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. [Citing *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938).] Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact. The government's burden is greater where consent is claimed to have been given while the defendant is under arrest. [Citations omitted.]

In *United States* v. *Blalock,* 255 F. Supp. 268 (E. D. Pa. 1966), defendant, in reply to a request that he let his room be searched, replied that he "had no objection." Nevertheless, the court granted his motion to suppress the subsequently discovered evidence on the grounds that the warrantless search had been illegal. The court said:

> First, the consent must have been "intelligent." Obviously, the requirement of an "intelligent" consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a "known right." . . . Certainly, one cannot *intelligently* surrender that which he does not know he has. . . . The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. . . . It cannot be said, then, that the Government has sustained its burden of showing that there was an intelligent waiver of a known right.

Blalock was cited with approval in *United States* v. *Nikrasch*, 367 F. 2d 740 (7th Cir. 1966).

In other Court of Appeals cases, however, it has not been found necessary that the police advise the concerned party of his right to refuse a search which would be illegal without a warrant. See *Robinson* v. *United States*, 325 F. 2d 880 (5th Cir. 1964); *Montana* v. *Tomich*, 332 F. 2d 987 (9th Cir. 1964); *Chapman* v. *United States*, 346 F. 2d 383 (9th Cir. 1965), certiorari denied, 383 U. S. 909 (1965); *Robbins* v. *MacKenzie*, 364 F. 2d 45 (1st Cir. 1966), certiorari denied, 385 U. S. 913 (1966).

The distressing problems involved in waiver of the right to counsel and the right to remain silent produced the precise safeguards laid down in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The right to refuse an illegal search is no less fundamental than either of these rights—and this Court has long recognized the close connection between the Fourth and Fifth Amendment freedoms. Consequently, it is vital that this Court specify that a person can no more waive the right to refuse an illegal search unless he has been fully informed of that right than he can waive the right to counsel without such a warning.

In addition to the question of warning, this case presents the problem of a man who was asked to waive a fundamental right while he was clearly under the influence of alcohol. A waiver must be made "intentionally," and "understandingly and knowingly," and "the standard . . . depends on the considered choice of the petitioner." *Fay* v. *Noia*, 372 U. S. 391, 439 (1963), citing *Carnley* v. *Cochran*, 369 U. S. 506, 513-17 (1962), and *Moore* v. *Michigan*, 355 U. S. 155, 162-65 (1957). There are many influences unrelated to po-

lice presence or actions which may affect the competency of a waiver whose validity is defined in such strict terms. Besides intoxication, such influences are shock, distress, exhaustion, temporary insanity, and hysteria. The problem of evaluating a waiver in the face of such influences has received very little attention in the courts. One case in point is *Logner* v. *North Carolina*, 260 F. Supp. 970 (M. D. N. C. 1966), in which the court said: "Even though the petitioner in his intoxicated state might attempt to waive his constitutional rights to remain silent or to have counsel, the waiver would have to be ineffectual *because the petitioner's judgment was impaired.*" [Italics added.] In the case at hand, even if petitioner was not in fact in such a state as would be called "intoxicated" or "drunk," his condition should at least have raised a serious doubt about his capacity to make a competent waiver. There must be some situations in which a man *should not be asked* to waive a constitutional right, particularly when, as here, the police could easily have avoided the necessity of making the request.

For both of these reasons, the search and seizure issue in this case is of substantial importance, meriting full consideration by this Court.

2. The failure of the trial court to appoint an attorney to represent petitioner after his initial application on December 18, 1964, was a denial of due process of law. As a result of this denial, petitioner did not have counsel to assist in preparation of his defense to two capital charges until February 2, 1965, almost three months after his arrest. Since the trial was scheduled to begin March 15, 1965, and since the trial court refused to grant a continuance before the trial (see Point 3, *infra*), petitioner was

materially prejudiced by the initial denial of his motion for counsel. Furthermore, in the intervening period between the denial of the request and the ultimate appointment of counsel, petitioner was examined to determine his capacity to stand trial. Testimony about this examination by one doctor was used to impeach petitioner at trial. Clearly this was a "critical" stage in the pre-trial proceedings. This Court has said that it will not stop to determine whether prejudice has resulted when counsel has been denied at such a stage, *White* v. *Maryland*, 373 U. S. 59 (1963).

The issue, therefore, is the propriety of the trial court's denial of petitioner's request for counsel on December 18, 1964. A substantial federal question is presented in this case concerning the responsibility of a trial court in seeing that a defendant in a capital case is insured a fair trial, with adequate assistance of counsel. The trial court refused petitioner's request in this case in part because it found that petitioner "is not indigent and therefore is able to employ counsel of his own choosing." While it is true that the evidence shows that petitioner was not entirely without funds, the evidence also shows that, even discounting his wife's impending divorce action, petitioner did not have available the $20,000 which, according to his appointed counsel after trial, would have been the compensation called for by the Topeka Bar Association's minimum fee schedule for the amount of work the case did in fact require (R. 249).

The court further said that "no evidence has been presented to show that defendant has made any effort to employ counsel, nor is there evidence that any counsel has refused employment," but given this Court's strict policy about waiver of fundamental constitutional rights, petitioner's behavior certainly cannot be considered a deliberate

waiver, made "intelligently and understandingly," as required in *Carnley* v. *Cochran,* 369 U. S. 506 (1962). Even the Kansas statute concerning right to counsel (K. S. A. 62-1304) requires that waiver of the right must be in writing.

Given the doubt about petitioner's ability to employ adequate counsel and the lack of a deliberate, competent waiver, the trial court had a duty to take no chance of letting petitioner's apathy prejudice the criminal process in such a fundamental aspect as representation by counsel. When a man is facing a capital charge based on a strong net of circumstantial evidence, it is wholly unrealistic to expect him to act calmly and intelligently with respect to his fundamental rights. Even the trial court eventually recognized its duty in this area, since its order of February 2, 1965, appointing counsel cites no further evidence of indigency and only adds that petitioner had advised the court that he did not intend to employ counsel. The trial court, by not acting upon the first request, failed to meet the standards required by the Sixth and Fourteenth Amendments. That error warrants correction by this Court,

3. The argument that the refusal to grant petitioner a continuance was a denial of due process of law is closely tied to the argument above concerning the refusal of the court to appoint counsel on petitioner's request. Just as the fact that in this capital case it was necessary that the trial court see that petitioner had counsel, so was it all the more necessary that petitioner's counsel below have sufficient time to prepare for trial. The question of continuance is traditionally said to be within the discretion of the trial judge, but this Court has often reviewed that discretion, looking to "the circumstances present in every case."

Ungar v. *Sarafite*, 376 U. S. 575 (1964). In this case, in the six days before trial, seven additional witnesses were added to the information, bringing the total number of witnesses endorsed by the prosecution to over seventy. Furthermore, there was in fact important additional evidence, which petitioner's counsel was not able to discover before trial, showing that petitioner was in fact materially prejudiced by the denial of the continuance. This additional evidence, going to the possibility that responsibility for a crime committed by someone else was being deliberately charged against petitioner, is set out in pages 271-374 of the Record and was cursorily treated by the Kansas Supreme Court (R. 523-24; App., *infra*, pp. 41a-42a). It is true that a defendant's attorney can always argue before trial that he should have a continuance to seek additional evidence, but the argument carries extraordinary weight when the offense is capital and the evidence against the defendant is as complex and as circumstantial as in this particular case.

These two considerations, together with the delay in appointment of counsel to represent petitioner, show an abuse of discretion by the trial court constituting a violation of due process of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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